

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Flava Works, Inc.,)	
)	
Plaintiff,)	Case No. 1:12-cv-01885
)	
v.)	
)	Hon. Judge Joan H Lefkow
Frank Rossi,)	
)	
Defendant)	

**DEFENDANT FRANK ROSSI'S RESPONSE TO
PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM**

Now comes, Defendant FRANK ROSSI ("Defendant"), by and through his attorneys, Saper Law Offices, LLC, to respond to the motion of Plaintiff Flava Works, Inc. ("Plaintiff") pursuant to Federal Rules of Civil Procedure § 12(b)(6) to dismiss Defendant's Counterclaim.

ARGUMENT

Plaintiff asserts that Defendant failed to plead the necessary breach-of-contract elements of (1) substantial performance of the contract by Defendant and (2) a breach by Plaintiff. Even a cursory review of Defendant's Counterclaim shows that this assertion is baseless.

With respect to substantial performance, Defendant pled to ¶ 10 that he had continued to pay for his account on Plaintiff's website through at least September 2010. This was despite Defendant's attempts to cancel the account in July 2007. *See* Counterclaim, ¶¶ 2-6. Defendant performed his obligations under the member agreement, and Defendant has sufficiently pled this fact in association with his Counterclaim.

With respect to the breach by the Plaintiff, Plaintiff's own member agreement stated that Defendant could cancel his account in the support section of Plaintiff's website. *See id.*, ¶ 7. Instead of

complying with their agreement, Plaintiff deferred to CCBill.com. See *id.*, ¶ 6. However, as Defendant pled in ¶¶ 2-3 of his Counterclaim, Defendant had already contacted CCBill.com in an attempt to cancel his account. *Id.* CCBill.com Member Services could not locate the account and recommended Defendant contact Plaintiff directly for cancellation of the account. *Id.*, ¶ 4. Plaintiff's proposed substitute to performing its obligations under the User/Subscriber Agreement was therefore inadequate, leaving Defendant with no way to properly cancel his account. See *id.*, ¶ 8. It was not until over three years later that Defendant realized, through a general message to CCBill.com Member Services questioning why he was still being charged monthly fees despite his CCBill.com account showing no active memberships: that he was still paying for an account on Plaintiff's website. See *id.*, ¶¶ 8-11. As of the date of his Counterclaim, Defendant has still been unable to locate the account that is the subject of this lawsuit in his CCBill.com member history, despite Plaintiff's claim to the contrary.

Having pled that he substantially performed his obligations by paying his membership fees and having pled that Flava Works breached its obligations by refusing to "cancel [Defendant's] subscription in the support section of [its] site" or by providing any other reasonable means of cancellation, Defendant has properly alleged a breach of contract claim.

WHEREFORE, Defendant Frank Rossi requests this Court to dismiss the Motion to Dismiss his Counterclaim.

Dated: July 30, 2013

Respectfully submitted,

Defendant Frank Rossi

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